STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Cooper, P.J., Markey and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs No.

GEVON RAMON DAVIS
Defendant-Appellee.

Lower Court No: 02-009635-FH
COA NO. 242207

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Defendant stole a car in Michigan and drove it to Kentucky, where he was convicted by plea of attempted theft by unlawful taking and given a conditional sentence that did not require him to serve any time in jail. He was also charged with Michigan with UDAA and receiving or concealing, and those charges dismissed on jeopardy grounds. Is *People v Cooper*'s "dual sovereignty" limitation defensible, particularly in light of *People v Nutt*?

Defendant answers: "YES"

Amicus answers: "NO"

Statement of Facts

Amicus adopts the statement of facts of the People, who are appellant.

Argument

I.

Defendant stole a car in Michigan and drove it to Kentucky, where he was convicted by plea of attempted theft by unlawful taking and given a conditional sentence that did not require him to serve any time in jail. He was also charged with Michigan with UDAA and receiving or concealing, and those charges dismissed on jeopardy grounds. *People v Cooper*'s "dual sovereignty" limitation is indefensible, particularly in light of *People v Nutt*.

In *People v Nutt*[1] this court rejected the "same transaction" view of double jeopardy under the Michigan Constitution because of the court's conclusion that "at the time of the ratification of our 1963 Constitution, the people of this state intended that the words 'same offense' be construed consistent with state and federal double jeopardy jurisprudence as it then existed." The historical analysis undertaken by the court, including its review of the Constitutional Convention record, compels precisely the same result with regard to Michigan's deviation from the view of the United States Supreme Court with regard to the double-jeopardy principle of dual sovereignty.

There Is No Justification In Law For Construing Article I, § 15 To Apply To Successive Prosecutions by Another State and Michigan

Current dual sovereignty doctrine in Michigan is unsupportable by the text, history, and structure of the Michigan Constitution.

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[1] *People v Nutt*, 469 Mich 565 (2004).

(1) The Source of Law: "The Law The People Have Made"

Amicus will undertake to examine the Article 1, § 15's meaning in the context of Michigan jurisprudential history, and the Constitutional Convention Record for the 1963 Constitution. Before so doing, however, one must ascertain what proper use is made of such material; in other words, does the understanding of a constitutional provision by those who drafted and ratified it make any difference in considering its meaning in a current case? [2]

Michigan's foremost jurist, Justice Cooley, in his seminal work *Constitutional Limitations*, long ago set forth the principal maxim of construction of a constitutional provision, stating that "The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.*"[3] This method of construction is a part of our jurisprudential history. The court is to "*declare the law as written*, leaving it to the *people themselves to make such changes as new circumstances may require*. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time

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[2] The view here expressed was employed by this court in *Nutt*: "Our goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers....To this end, we apply the rule of 'common understanding.'...In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' 1 Cooley, Constitutional Limitations (6th ed.), p. 81. Constitutional Convention debates and the Address to the People are certainly relevant as aids in determining the intent of the ratifiers." At the risk, then, of belaboring the obvious or preaching to the choir, amicus here briefly makes the historical argument against *People v Cooper*.

[3] Cooley, *Constitutional Limitations,* p. 55 (emphasis in the original).

when a court has occasion to pass upon it."[4] As another of Michigan's great justices, Justice Campbell, put it,[5] "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the *acts of the people* in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them." This does not mean that the constitution is "static" in that it cannot be applied to unforeseen events or developments (such as modern technology)–surely, its principles can be applied to new situations, as Justice Campbell recognized over 125 years ago: "That the constitution *means nothing now that it did not mean when it was adopted*, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[6] But the *principles* do not change--the constitution does not change to meet the times–the constitution is simply capable of *application* to new circumstances.

As indicated above, the task of a court faced with a question of the meaning of a constitutional provision is "*to give effect to the intent of the people in adopting it.*" How is this to be done? In particular, of what relevance is the fact that a state constitutional

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[4] Cooley, at 55 (emphasis supplied)

[5] *People* v *Blodgett*, 13 Mich 127, 138 (1865).

[6] *Blodgett*, at 140 (emphasis added).

provision, here Article I, § 15, and a federal constitutional provision, here the Fifth Amendment, use virtually identical language: "No person shall be subject for the same offense to be twice put in jeopardy" (the Fifth Amendment including the archaic language "of life or limb")? Because the federal Bill of Rights was not applicable in *any* measure until 1961, and because complete "selective incorporation" did not occur until after 1963, even if the framers and ratifiers of the Michigan Constitution intended to mirror the federal Constitution –and they did– their purpose was not simply rhetorical, for until incorporation of the federal jeopardy protection occurred the State provision supplied ***the*** basis for protection of individual liberties.

It would seem, then, to be logical and justifiable to begin analysis of the meaning of provisions of the state Declaration of Rights by presuming, in circumstances where the language of the state provision tracks that of a corresponding federal provision, that the original understanding or meaning was to provide to state citizens the same protection against the state government as they were provided by the federal Bill of Rights against the federal government. This view prevails when state statutes which are drawn from a corresponding federal statutory scheme are construed by state courts--federal decisions interpreting the federal statutes are given heavy weight. For example, precedent under the National Labor Relations Act is persuasive in construing the Michigan Public Employment Relations Act because PERA is drawn from the NLRA and parallels its provisions.[7] As

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[7] See e.g. *Kalamazoo City Ed Ass'n* v *Kalamazoo Public Schools*, 406 Mich 579, 593, fn 1 (1979).

stated by Justice Frankfurter: "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[8] Thus, federal decisions interpreting the federal guarantees from which the state guarantees were drawn should be given heavy weight in interpreting the state provisions, particularly because it is highly probable that the framers replicated the federal language for the purpose of providing the federal rights to the state citizens.

To the extent that the language *differs* textual analysis may yield a result interpreting the state provision as providing different, greater, or lesser protections than the corresponding federal provision, but the analysis must be principled; that is, based upon language which provides a difference in substance and not merely form. Moreover, history may teach that the drafters and ratifiers had something in mind as to what would be protected by a particular provision. The point is that if differences in wording are to be employed as a decisional basis for concluding that a Michigan provision means something different from the corresponding federal provision, a principled analysis is required. If the differences are merely stylistic, it should be presumed that the original meaning or understanding was to see the protection afforded against the federal government to the state citizens apply also to the relationship of the citizens to the state government, and federal decisions interpreting the federal guarantees should be given heavy weight. Here, of course, there is virtually no difference between the state and federal provisions.

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[8] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 527, 537 (1947)

In sum, it should be presumed that state constitutional language mirroring language of the federal constitution carries the same meaning, as this presumption is simply "a convenient formulation of the overarching responsibility to find a principled basis in the history of our jurisprudence for the creation of new rights....the courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts. On the other hand, our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government."[9] Telling factors in the analysis are:

- the textual language of the state constitution,
- significant textual differences between parallel provisions of the two constitutions,
- state constitutional and common law-history,
- state law preexisting adoption of the relevant constitutional provision,
- structural differences between the state and federal constitutions, and

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[9] *People v Sitz*, 443 Mich at 744, 763 (1993). See also *People* v *Mezy*, 453 Mich 269 (1996), opinion of Justice Weaver: "When construing a constitution, the Court's task is to 'divine the 'common understanding' of the provision, that meaning 'which reasonable minds, the great mass of the people themselves, would give it.'...Relevant considerations include the constitutional convention debates, the address of the people, the circumstances leading to the adoption of the provision, and the purpose sought to be accomplished."

- matters of peculiar state or local interest.[10]

Here, factors 1) and 2) regarding the text of the parallel provisions reveal a virtual identity of language, creating a presumption of identical meaning. Amicus will now turn to a discussion of the remaining factors.

(2) The Michigan Constitution and Cooper: The Break From the Federal Understanding

Michigan has "gone its own way"–that is, parted company from the interpretation of double jeopardy protections under the Fifth Amendment to the United States Constitution of the United States Supreme Court –in two principal areas. Michigan, for a time, had a fundamentally different conception of the meaning of the word "offense," translating it as "transaction," than understood under the Fifth Amendment, and still has a different conception of its sovereignty as relates to jeopardy protections than has the United States Supreme Court. The same-transaction test departure of *People* v *White*[11] has now been abrogated by *People v Nutt, supra.* This court should do likewise with *People Cooper*,[12] where the court at that time declined to follow United States Supreme Court authority interpreting the Fifth Amendment with regard to the concept of dual sovereignty.

Cooper was acquitted of bank robbery in federal district court, but convicted of attempted murder, bank robbery, and assault with intent *to* rob being armed in Calhoun

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[10] *Sitz*, at 763, fn 14.

[11] *People* v *White*, 390 Mich 245 (1973).

[12] *People Cooper,* 398 Mich 450 (1976).

County Circuit Court, for an attempt to rob a bank with the use of explosive devices; as the court noted, only "heroic action by bank and police officials prevented what might otherwise have been a tragic loss of life." The court recognized that defendant's jeopardy claim failed under the Fifth Amendment given *Bartkus* v *Illinois*.[13] But the court found that "The trend in United States Supreme Court decisions leads us to conclude that the permissibility of Federal-state prosecutions as a requirement of our Federal system is open to reassessment." Indeed, the court was of the view that the decision in *Benton* v *Maryland*[14] applying the Fifth Amendment jeopardy guarantee to the states through the due process clause, had "seriously undermined" *Bartkus*.[15]

The court concluded that "We feel that the best interests of the state and the defendant are accommodated....and we so hold, that Const 1963, art 1, §15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different."[16] Again, the decision was based on what the court felt was the best policy ("the best interests of the state and the defendant are

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[13] *Bartkus* v *Illinois*, 359 US 121, 79 S Ct 676, 3 L Ed 2d 684 (1959).

[14] *Benton* v *Maryland*, 395 US 784, 89 S Ct 2056, 23 L Ed 2d 707 (1969).

[15] Later decisions of the Supreme Court of the United States demonstrated that the court was absolutely mistaken in its projection of the trend of United States Supreme Court decisions in this area; those latter decisions from the United States Supreme Court will be discussed subsequently.

[16] Justice Coleman concurred, but expressed the view that the "same transaction" test would not apply in dual sovereignty analysis.

accommodated"), rather than on what the constitution–the law the People have made–c*ompelled; at least no analysis was made regarding what the text and history demonstrate as to the proper meaning of the jeopardy protection of the state constitution.

(3) Article 1, § 15 and the "Law the People Have Made"

(a) The Convention Record

The Michigan Constitution of 1835 provided a jeopardy protection in Article 1, § 12, in language virtually identical to the Fifth Amendment: "No person for the same offence, shall be twice put in jeopardy of punishment." But that language was *narrowed* by the Constitution of 1850, which provided in article 6, § 29 only that "No person *after acquittal upon the merits* shall be tried for the same offense." This language was carried forward in Article 2, § 14 of the Constitution of 1908: "No person, after acquittal upon the merits, shall be tried for the same offense." Thus, when the Michigan Constitutional Convention of 1961 met it faced the situation where 1)the Fifth Amendment was inapplicable to the states, and 2)Michigan's jeopardy provision provided by its clear language for *less* protection against multiple prosecutions as against state officials than the Fifth Amendment provided in the federal system as against federal officials.

This did not escape the notice of the delegates at the convention. It was recommended that the language be changed to "No person shall be put in jeopardy twice for the same offense." The committee on the judicial branch observed that while it appeared that the Convention of 1908 wished to limit jeopardy to acquittals on the merits, Michigan courts

had never interpreted the clause as meaning what it said, but instead had substituted federal interpretations of the Fifth Amendment regarding jeopardy protection.[17] Delegate Ford spoke in favor of the change, stating that the language was taken by the committee "directly from the Alaska constitution, which duplicates the language in 24 constitutions of the United States and is in line with the federal constitution....we were taking safe language that was not open to semantic differences of opinion or construction...."[18] Mr. Stevens noted that "if you read the original provision, it might be difficult to understand why the supreme court has ruled that it means what we are putting in here now."[19] In other words, the delegates believed that the Michigan Supreme Court had not read the Michigan jeopardy protection to mean what it said, but had read it as though its language read the same as the federal protection; thus, in the view of the delegates it made sense to simply use the language that the Michigan Supreme Court had read into the Michigan Constitution in any event, even though, from the language of the 1908 provision, "it might be difficult to understand" how the Michigan Supreme Court had managed to read "No person, after acquittal upon the merits, shall be tried for the same offense" to provide *state* jeopardy protection other than after an acquittal on the merits.

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[17] Convention Record, p.542.

[18] Convention Record, p.543.

[19] Convention Record, at 543.

Attempting to clarify the proposed change, Mr. Boothby asked "the wording of the present constitution would indicate that 'jeopardy' under the literal interpretation of the present constitution would not attach unless there was an acquittal," and Mr. Stevens responded that "That would seem to be what it says; but the Supreme Court of the State of Michigan doesn't agree...so we want to *make the constitution read the way the supreme court says it does read.*"[20] Mr. Boothby persisted with "one further question. Under the literal interpretation of the present constitution–and I don't mean what the courts have decided–but under the *literal interpretation of the words*, if the prosecution began a criminal case and the jury was empaneled, but on the motion of the prosecutor himself the case was dismissed–under the literal interpretation–a person could be tried again, is that not correct under the literal interpretation?" to which Mr. Stevens answered "That is correct, if I know what you mean by literal interpretation. That's what it seems to say."[21]

The provision was also considered by the committee on declaration of rights, suffrage, and elections, which reached a similar conclusion, as the drafted committee comment to the proposed new provision stated that: "The foregoing change in § 14 involves *the substitution of the double jeopardy provision from the Constitution of the United States* (except for the deletion of the obsolete words of 'life or limb') in place of the original provision which merely prohibits retrial after 'acquittal upon the merits.' The former

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[20] Convention Record, p. 544.

[21] Convention Record, p. 544.

language, the committee points out, has been consistently construed by the Michigan supreme court to mean something quite different than the words on the surface appear to connote. Taken literally, the words appear to say that there is no double jeopardy until a trial has run its course complete to acquittal. In fact, however, the Michigan courts *have followed the federal rule on double jeopardy*. The new language thus appears to be consistent with the actual practice of the courts in Michigan."[22]

It is clear, then, that the intention of the drafters of the Michigan jeopardy provision for the 1963 convention was to substitute the language of the Fifth Amendment for the more limited language of the 1908 constitution for the reason that the Michigan Supreme Court had (and Amicus would submit quite improperly) failed to read the Michigan provision as meaning what it plainly said, but instead had "followed the federal rule on double jeopardy."[23] Given the actions of the court, the delegates decided to simply make the provision *actually* say what the Michigan Supreme Court had read it to say, so as to avoid confusion in the future. This was the intent of the drafters, but what of the true source of authority of the constitution–the People, as ratifiers?

Again, Justice Cooley supplies the proper framework for analysis. It is clearly true that "the constitution does not derive its force from the convention which framed, but from

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[22] Convention Record, p.468.

[23] And this history is recounted in *Nutt.*

the people who ratified it...."[24] Both Justice Cooley and Justice Campbell spoke to the point in *Blodgett*, supra. Justice Campbell observed that "The constitution is eminently a popular instrument, binding according to its terms, and requiring for their interpretation such rules as will not warp its sense from what its language shows it probably appeared to those who adopted it."[25] Further, "The constitution, although drawn up by a convention, derives no vitality from its framers, but depends for its force entirely upon the popular vote. Being designed for the popular judgment, and owing its existence to the popular approval, its language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice."[26] Similarly, Justice Cooley stated that "There are certain well settled rules for the construction of statutes, which no court can safely disregard. Where the statute is plain and unambiguous in its terms, the courts have nothing to do but to obey it....The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern....These rules are especially applicable to constitutions; for the people, in passing upon them, do not examine their clauses with a view to discover a secret or a double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed."[27]

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[24] Cooley, at 66.

[25] *Blodgett*, at 141.

[26] *Blodgett*, at 141.

[27] *Blodgett*, at 167-168.

This being the case, then, the meaning of a constitutional provision is to be garnered understanding that the ratifiers looked to the words employed "in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense to be conveyed."[28] When the Constitution of 1963 was proposed to the People of the State for ratification, each section carried with it an explanatory "Convention Comment" to the ratifiers. The comment to Article 1, § 15, declared that "This is a revision of Sec. 14, Article II, of the present constitution. The new language of the first sentence involves the *substitution of the jeopardy provision from the U.S. Constitution in place of the present provision which merely prohibits 'acquittal on the merits.'* This is more consistent with the actual practice of the courts in Michigan." It was thus the intention of the framers to substitute the federal jeopardy provision for the more limited Michigan provision, and in words "obvious to the common understanding" this was specifically stated to the People of the State before the ratification vote.

It is thus plain that 1)Article 1, § 15, does not differ in its text in any material way from the Fifth Amendment provision, 2)that the very intent of the drafters of the provision was to substitute for the prior narrower provision the language of the Fifth Amendment precisely because the narrower state provision, despite its clear language, had been construed by the Michigan Supreme Court in a manner consistent with the Fifth Amendment language, and 3)that in plain language this intention was conveyed to the ratifiers. Not only is there

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[28] Cooley, at 66.

a presumption, then, that in replicating the Fifth Amendment the intent of the framers and the ratifiers was to have a congruent meaning between the two provisions, but that intent is laid bare with regard to Article 1, § 15. How, then, *had* the Fifth Amendment jeopardy protection been construed at the time of the ratification of Article 1, § 15?

(b) Federal Jurisprudential History

As Amicus noted earlier, when a phrase or provision is borrowed from another source, it brings its construction with it. There is thus a presumption that the construction existing in the jurisdiction where the provision was borrowed applies as well in this state; there is no such presumption as to *subsequent* constructions by that jurisdiction, though they may well be entitled to great weight in the analysis.[29] With regard to the matter at issue here–a state prosecution subsequent to a federal prosecution–what federal construction existed at the time Michigan specifically and intentionally "borrowed" the Fifth Amendment jeopardy provision? In Justice Frankfurter's language, what "soil" came with the plant?

Bartkus v *Illinois* was decided several years in advance of the Michigan Constitutional Convention of 1961, and its holding was only consistent with prior law on the dual sovereignty question. The defendant in *Bartkus* was tried federally for robbery of a federally insured savings and loan association, and acquitted. Subsequently, he was charged, tried, and convicted in the State of Illinois for robbery of the same institution for the same precise act. Justice Frankfurter for the Court noted that the question of dual

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[29] See *People* v *Messer*, 148 Mich 168 (1907).

sovereignty was "not a new question before the Court," as the double jeopardy claim had "been invoked and rejected in over twenty cases" of successive state and federal prosecutions before the Court, going back more than 100 years.[30] The Court concluded that "Time has not lessened the concern of the Founders in devising a federal system...," and held that prosecutions by separate sovereigns do not offend the Fifth Amendment.

The "soil" that came with the Fifth Amendment language included holdings going back more than 100 years, including one only several years old, that a state prosecution following prosecution by the federal government for precisely the same act raises no jeopardy issue whatsoever. Though no presumption attaches with regard to interpretations subsequent to the ratification of Article 1, § 15, subsequent United States Supreme Court decisions reveal that the forecast in *Cooper* of the "trend" of federal decisions on dual sovereignty was sorely mistaken. The United States Supreme Court has not only failed to "back away" from the dual sovereignty doctrine, but has strongly endorsed it.

In *Heath* v *Alabama*[31] the defendant arranged for the kidnap/murder of his wife, who was kidnapped from their home in Alabama and shot, and her body abandoned in Georgia. Defendant pled guilty to murder in Georgia in exchange for a sentence of life imprisonment, and also tried for the murder in Alabama, where he was sentenced to death. Citing *Bartkus*,

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[30] 3 L Ed 2d at 690.

[31] *Heath* v *Alabama*, 474 US 82, 88 L Ed 2d 387, 106 S Ct 433 (1985).

and decisions prior to *Bartkus*,[32] the Supreme Court adhered to the dual sovereignty doctrine. Writing for seven members of the Court, Justice O'Connor observed that "The States are no less sovereign with respect to each other than they are with respect to the Federal Government....each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'"[33]

Moreover, said the Court, the rationale supporting the dual sovereignty doctrine "is not simply a fiction that can be disregarded in difficult cases." Rather, it "finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself...."[34] The Court declined to revisit and revise the dual sovereignty doctrine because "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws....In recognition of this fact, the Court consistently has endorsed the principle that a single act constitutes an 'offence' against each sovereign whose laws are violated by that act. The Court has always understood the words

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[32] Such as *Westfall* v *United States*, 274 US 256, 71 L Ed 1036, 47 S Ct 629 (1927), where Justice Holmes remarked that the proposition that the State and Federal Governments may punish the same conduct "is too plain to need more statement."

[33] 88 L Ed 2d at 395.

[34] 88 L Ed 2d at 396.

of the Double Jeopardy Clause to reflect this fundamental principle, and we see no reason why we should reconsider that understanding today."[35]

(4) Conclusion

There is nothing in the structure of the state constitution, or in the nature of the sovereignty of this State, which suggests that any degree of State sovereignty with regard to the political power of the State to define crime, ordain punishment, and *execute* penal laws has been ceded either to the federal government or any other state. Structural analysis of the constitutional form of our government, then, as well as an analysis of the constitutional text and its history and origins, lead to the conclusion that there is no state constitutional prohibition on successive federal and state prosecutions under Article 1, § 15, of the sort imposed in *Cooper*. Nothing in the Michigan Constitution authorizes the judicial branch of government to cede state sovereignty as to enforcement of state criminal law to other sovereigns, on the ground that the judicial branch prefers the policy supporting the system it is creating.[36] The case here, then, should be reinstated.

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[35] 88 L Ed 2d at 397.

[36] And nothing in Michigan law at the time of the ratification of the Michigan jeopardy provision suggested that Michigan had a different dual sovereignty view than obtain under the federal constitution: "The substance of the matter is this: When a defendant has violated both state and federal laws he is liable to each sovereign and subject to prosecution by each." *In re Illova* 351 Mich 204, 209 (1958).

Relief

Wherefore, Amicus suggests that the People's request for reversal of the order of dismissal should be granted, and the Court of Appeals and circuit court reversed.

Respectfully submitted,

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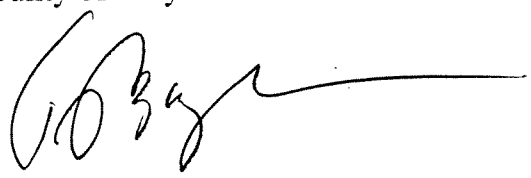

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